IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 10-0001

STATE OF MONTANA,
Plaintiff and Appellee,

v.

SHAWN EARL McCLURE,
Defendant and Appellant.

ON APPEAL FROM THE MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY.
THE HONORABLE JOHN C. BROWN, presiding.

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Following a hung jury and a mistrial, Shawn McClure (McClure) appeals his conviction for felony Partner or Family Member Assault, Mont. Code Ann. § 45-5-206. He was convicted by a jury on October 1, 2009, at the conclusion of a two-day trial. McClure was sentenced to five years in the Montana State Prison. He filed a timely notice of appeal. (Ex. A).

STATEMENT OF THE FACTS

The State of Montana (State) filed an information against McClure alleging that on May 30, 2008, he assaulted a partner or family member, namely W.M. The information filed by the State alleged that McClure purposely or knowingly caused bodily injury or reasonable apprehension of bodily injury to W.M. by

putting him in a headlock and/or striking him. (Trial Tr. pgs. 21 & 22).[1] For reasons explained below, there were three trials in this case. The first resulted in a hung jury, the second a mistrial, and the third trial (trial) resulted in McClure's conviction. Throughout all of the proceedings, McClure maintained two distinct themes: first, that he was innocent of the charges; and, second, that he wished to represent himself.

During the course of McClure's proceedings in Gallatin County there were, at minimum, four *Faretta* hearings held pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The dates for the hearings were: December 2, 2008, January 23, 2009, June 17, 2009, and June 18, 2009. At the conclusion of the June 18, 2009, *Faretta* Hearing, the district court agreed to allow McClure to represent himself. (June 18, 2009, Hrg. Tr., pg. 20). The district court assigned John Hud to act as standby counsel.

It was also during the June 18, 2009, hearing the district court advised McClure that if he disrupted the courtroom during trial, the court could order McClure's removal from the courtroom. (Id. at pgs. 15-16).

McClure began his self-represented trial on July 6, 2009. Shortly into

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[1]Because this September/October trial is the matter being appealed, all references to "Trial Tr." relate to that specific trial. Other transcript references will be designated by their date and proceeding.

McClure's process, he violated the court's motion in limine. McClure's *voir dire* did not proceed much farther as he again violated the court's instructions. At that point, the district court determined that McClure had waived his right to represent himself. (July 6, 2009, Trial Tr. pg. 87). Mr. Hud was called upon to step in. At the commencement of Mr. Hud's *voir dire*, McClure began to speak regarding issues which had been deemed inadmissible by the court's prior motions in limine. McClure was removed from the courtroom. Mr. Hud agreed to recommence *voir dire* questioning of the prospective jurors if they thought they could remain neutral despite witnessing McClure's outbursts. All but a few indicated they could not. A mistrial was declared. (Id. at pgs 100-106).

Later, when proceedings began again on McClure's case, McClure was never given the opportunity to represent himself *pro se* on the condition that he could abide by the court's ruling.

During in-chambers proceedings prior to the commencement of the third and final trial, the following conversation ensued:

COURT: Mr. Hud, at the Final Pre-Trial conference on September 21st, 2009, Mr. McClure advised the Court that he did not wish to attend or participate in this trial. Is that still true?

MR. HUD: (to Mr. McClure - - is that true?)

McCLURE: Yup.

COURT: Alright right. Now, Mr. McClure, you have the right not to be here and I will respect that right. We have made arrangements for you to go to Jury Room A which is on the top floor of the main building and you can watch this trial by video if you wish to do that.

McCLURE: No.

COURT: Are you sure?

McCLURE: Yup.

COURT: You're sure you don't want to be present?

McCLURE: Absolutely, positively.

COURT: Alright. Then I will - - before then - - I excuse you, Mr. McClure. Is there anything you wish to say?

(Trial Tr. pgs. 2-3).

At this point McClure proceeded to voice his concerns to the district court about various constitutional violations to which he had been subjected since his arrest on May 30, 2008, including the right to confront witnesses and the right to question and compel witness testimony. (Trial Tr. pg. 3). At the conclusion of McClure's grievances, the district court replied, "You may be excused, Mr. McClure." (Trial Tr. pg. 4). This concluded the district court's discussion with McClure about his right to be present at trial. Nowhere does the record reflect that the district court obtained a knowing, intelligent, and voluntary waiver from McClure of his right to be present during trial.

The trial commenced with McClure not present. His absence from trial was addressed on numerous occasions during *voir dire*. Counsel for the State was the first to bring McClure's absence to the attention of the jury. "The Defendant, Shawn McClure, is, as you may have noticed, not present in the Courtroom. I believe His Honor will instruct you that he has a Constitutional right to be present at trial and to be voluntarily absent from his trial as well." (Trial Tr. pg. 38). Mr. Hud, who represented McClure, never brought to the jury's attention that McClure was absent from the courtroom.

After the jury was picked and court was again in session, the district court made a point of stating that the record should show "Mr. McClure... has voluntary removed himself from participation in the trial." (Trial Tr. pg. 191). The only other mention of McClure's absence came in the form of a jury instruction by the district court to the jury. "A Defendant in a criminal trial has a right to voluntarily choose not to attend trial. You must not draw any inference from the fact that a Defendant is voluntarily absent from trial. Further, you must neither discuss this matter or permit it to enter in to your deliberations in any way." (Trial Tr. 412).

The issue again arose when the jury indicated it had reached a verdict. The district court indicated for the record, "Mr. Hud is here on behalf of Mr. McClure who has voluntarily chosen not to participate in the trial." (Trial Tr., pg. 455).

Counsel for the State, Mrs. Whipple, brought to the court's attention that there are two statutes regarding a defendant's absence from receipt of the verdict. (Trial Tr., pg. 455-456). Mrs. Whipple directed the court's attention to Mont. Code Ann. §§ 46-16-122 and 46-16-123. Mrs. Whipple indicated that Mont. Code Ann. § 46-16-122 provided that the court may proceed through the return of a verdict if a defendant is "voluntarily absent and the offense is not one that is punishable by death." (Trial Tr., pg. 456). The second statute, Mont. Code Ann. § 46-16-123 provides, "In all felony cases, the defendant shall appear in person when the verdict is returned or the sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the district court finds that it is in the interest of justice that the verdict be returned and the sentence be pronounced in the defendant's absence." Mont. Code Ann. § 46-16-123(2)(a); (Trial Tr., pgs. 456-457).

Pursuant to Mont. Code Ann. § 46-16-123(2)(a), the district court inquired of Mr. Hud regarding McClure's desires. Mr. Hud responded: "Your Honor, as far as I know, he hasn't changed his mind about wanting to be present. I didn't go over and talk to him, but I'd be totally shocked if all of the sudden he says, I want to be there for the verdict." (Trial Tr., pg. 457). After this brief statement by Mr. Hud, the district court summarized the proceedings and its concerns about

McClure's return to court for the receipt of the verdict. The district court concluded that it was in the interests of justice that McClure not be present for the receipt of the verdict. (Trial Tr., pg. 457-459).

The jury convicted McClure. (Trial Tr., pg. 460). On November 4, 2009, the district court – with McClure present – sentenced McClure to five years in the Montana State Prison. (Sent. Tr., pg. 25).[2]

SUMMARY OF THE ARGUMENT

Issue I

Mr. McClure's procedural due process rights were violated when he was excluded from the first whole day of his criminal trial without the district court first obtaining an on-the-record, personal waiver of his Sixth Amendment rights under the United State Constitution, and his right to be present at his criminal trial, guaranteed by the Montana Declaration of Rights.

Even though McClure's counsel never objected to the district court's failure to advise McClure of the perils of being tried *in absentia*, the matter is one of structural error. By this Court's prior precedent, no objection was necessary, nor does McClure have to demonstrate prejudice.

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[2]During the sentencing hearing, McClure engaged in bizarre behavior and directed various invectives toward the district court, the prosecution, and his attorney.

Issue II

The district court violated McClure's right to *pro se* representation by denying McClure that right in his third, and final trial.

STANDARD OF REVIEW

Whether a criminal defendant's right to be present at a critical stage of his or her trial has been violated is a question of constitutional law, and this Court's review of questions of constitutional law is plenary. *State v. McCarthy,* 2004 MT 312, ¶ 29, 324 Mont. 1, ¶ 29, 101 P.3d 288, ¶ 29.

Where substantial credible evidence exists to support the district court's decision requiring standby counsel to assist in the defense where a pro se defendant fails, or is unable, to adhere to proper courtroom procedure and protocol, it will not be disturbed on appeal. *State v. Colt*, 255 Mont. 399, 409, 843 P.2d 747, 753 (1992).

ARGUMENT

I. THE DISTRICT COURT COMMITTED STRUCTURAL ERROR WHEN IT PERMITTED McCLURE TO BE TRIED *IN ABSENTIA* WITHOUT FIRST OBTAINING HIS KNOWING, INTELLIGENT AND VOLUNTARY WAIVER.

This Court has held that the right to be present at all stages of a criminal proceeding is one of the most fundamental rights guaranteed by the federal

constitution. *State v. McCarthy*, 2004 MT 312, ¶ 30, 324 Mont. 1, ¶ 30, 101 P.3d 288, ¶ 30. (citing the Confrontation Clause of the Sixth Amendment; *Illinois v. Allen*, (1970) 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353.) Likewise, Article II, Section 24 of the Montana Constitution guarantees a defendant the right to be present at all stages of his trial. *McCarthy,* at ¶ 30. The Montana Supreme Court has recognized that this is a fundamental right because it is found in Montana's Declaration of Rights and because it is a right "without which other constitutionally guaranteed rights would have little meaning." *Id.*

Trial in General

Close to 90 years ago, this Court, when faced with the question of the defendant's presence at his trial, interpreted an identical provision of the 1889 Montana Constitution to mean that "the defendant must be present throughout the *entire* trial." *State v. Bird,* 2002 MT 2, ¶ 26, 308 Mont. 75, ¶ 26, 43 P.3d 266, ¶ 26. (citing *State v. Reed* (1922) 65 Mont. 51, 56, 210 P. 756, 757). The Court, in *Reed*, stated that:

> No principle of law, relating to criminal procedure, is better settled than that, in felony cases, nothing should be done in the absence of the prisoner. It is his *unquestioned right* "to be confronted with his accusers and witnesses." He has the legal right to be present when the jury are hearing his case, and at all times during the proceeding of the trial, when anything is done which in any manner affects his right... *Bird,* at ¶ 26. (Emphasis added).

In Montana, Section 46-16-122 of the Montana Code Annotated outlines those instances in which a defendant may be absent in felony cases after the trial has commenced in his presence. The pertinent portion states:

> (3) After the trial of a felony offense has commenced in the defendant's presence, the absence of the defendant during the trial may not prevent the trial from continuing up to and including the return of a verdict if the defendant:
>
> (b) is voluntarily absent and the offense is not one that is punishable by death.

Mont. Code Ann. § 46-16-122 (2009).

Because a defendant's right to be present at his trial is so fundamental, it cannot be easily waived. Waiver can occur in only two ways: (1) by intentional failure to appear or, (2) by express personal waiver by the defendant. *McCarthy* at ¶ 32. This Court has stated that it will not "engage in presumptions of waiver; any waiver of one's constitutional rights must be made specifically, voluntarily, and knowingly." *Id.*

Waiver cannot be specific, voluntary or knowing unless a defendant fully understands the implications of such a waiver. *Id.* In other words, "waiver is defined as the voluntary abandonment of a known right." *Bird* at ¶ 35. It is, therefore, the duty of a trial court to adequately explain to a defendant his or her rights before the defendant can effectively waive a fundamental right. *Id*, ¶ 38.

Excluding the defendant from any critical stage of trial without first obtaining contemporaneous, personal, knowing, voluntary, intelligent and on-the-record waiver by a defendant is reversible error. *State v. Tapson*, 2001 MT 292, ¶ 33, 307 Mont. 428, ¶33 , 41 P.3d 305, ¶33. In *Tapson,* the district court took verdict forms into the jury room without the presence of counsel, Tapson or the court reporter. *Id.* Although the district court in *Tapson* was absent for a mere eleven minutes delivering the verdict forms, this Court held that Tapson was denied his constitutional right to be present at all critical stages of his trial. *Id.* Specifically, this Court found that Tapson was denied his fundamental constitutional rights because Tapson had no way of showing what was said during that eleven minutes:

> what advice, if any, was given by the district court to the jurors and how that might have affected their deliberations or verdict; he could not show what questions, if any, the jurors might have asked and how those were answered; and... he... could not gauge the subtleties of facial expressions or body language of the jurors or the court that might have provided grounds for objection. *Id.* at ¶ 35.

The Court reversed Tapson's conviction, finding that the district court had denied Tapson's right to be present at all critical stages of his trial without first obtaining his contemporaneous, personal, knowing, voluntary, intelligent and on-the-record waiver. *Id.* at ¶ 33.

A trial court must fully explain to a defendant, on-the-record, the

defendant's right to be present at all critical stages of his trial before a defendant can waive that right. Failure to do so is reversible error. *Bird*, at ¶ 27. In *Bird*, the defendant was excluded from an in-chambers *voir dire* conducted to elicit prospective jurors' personal feelings regarding domestic violence, which was one aspect of the charges brought against the defendant. *Id.* at ¶ 28. The State argued that the defendant had waived his right to be present because defense counsel had commented that the defendant did not have any feelings one way or the other about being present. *Id.* at ¶ 29. The Court held that neither the trial court, the prosecutor, nor defense counsel had informed Bird of his constitutional right to be present during the individual *voir dire*. *Id.* at ¶ 37. They had failed to obtain valid waiver before conducting a critical stage of the defendant's trial without his presence. *Id.* In response to this failure, this Court again instructed all trial courts to "explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial... and that if a defendant chooses to waive that right, the court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right." *Id.* at ¶ 38. The defendant's exclusion from a critical stage of his trial without waiver is **structural error**, undermining the integrity of the entire trial, resulting in reversal. *Id.* at ¶ 40 (emphasis added).

Waiver of a defendant's right to be present for all critical stages of his trial has been found to be valid only where the defendant was both apprised of his constitutional rights and then personally made a knowing, intelligent and voluntary on-the-record waiver. *McCarthy*, ¶ 34. In *McCarthy*, the defendant was involved in a physical altercation with jail personnel the night before the second day of his trial. According to defense counsel, Mr. McCarthy indicated that he was unable to be present for the second, and last, day of trial. *McCarthy*, ¶ 35. Accordingly, since the trial had commenced in the defendant's presence, the trial court made sure to establish, for the record, that the defendant was informed of his right to be present at all critical stages of his trial and that the defendant understood those rights before waiving them. *Id.* Since the defendant was not in the courtroom at the time, defense counsel, with the aid of the prosecutor, drafted a written waiver form, which, once signed by the defendant, established that the defendant was fully informed and voluntarily absented himself from the critical stages of the trial. *Id.* Because the defendant was duly informed of his right to be present, his signature on the waiver form established for the record that he knowingly, intelligently and voluntarily waived that right. *Id.*

While a signed waiver form may satisfy requirements of waiver of a fundamental right, providing defendant with closed-circuit monitors to observe

his own trial from the outside does not. *State v. Aceto*, 2004 MT 247, ¶ 47, 323 Mont. 24, ¶ 47, 100 P.3d 629, ¶ 47. In *Aceto*, the defendant was removed from the courtroom for being argumentative and disruptive without any warning from the district court. *See* Mont. Code Ann. § 46-16-122(3)(a) (authorizing the removal of a defendant from a criminal trial for disruptive behavior only after being duly warned by the district court). *Id.* at ¶ 36. Aceto was not allowed the opportunity to return to the courtroom at any point throughout the remainder of the trial. *Id.* at ¶ 37. Instead, the district court provided a closed-circuit television connection whereby the defendant could observe the proceeding. *Aceto*, ¶ 47. This Court found that the ability to observe one's trial from afar is not the same as actively participating in it and therefore, did not satisfy a defendant's right to be present for all critical stages of his trial. *Id.*

As noted above, this Court in *Bird*, found that the exclusion of a defendant from a critical stage of trial proceedings without a knowing and voluntary waiver is structural error. This Court has also defined structural error as error that is "typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. Because of its nature, it cannot be qualitatively or quantitatively weighed against the admissible evidence introduced at trial. Structural error is presumptively prejudicial and is not subject to harmless

error review jurisprudentially or under our harmless error statute found at § 46-20-701, MCA." *State v. Dewitz*, 2009 MT 202, ¶ 44, 351 Mont. 182, 212 P.3d 1040 (citing *State v. Van Kirk*, 2001 MT 184, ¶38-39, 306 Mont. 215, 32 P.3d 735).

In McClure's case, the district court was clearly frustrated with McClure. McClure was clearly frustrated with the district court. However, this mutual frustration does not relieve the district court of its obligations to elicit a knowing, intelligent, and voluntary waiver of McClure's right to be present during his trial. Even if McClure would have waived the right to be personally present, he also had the right to know what he was giving up. Absent that knowledge, the district court's allowance of McClure's absence from the trial, without first obtaining a knowing, intelligent, and voluntary waiver, resulted in constitutional infirmity which permeated the entire trial.

That McClure's counsel failed to object is irrelevant because this Court has already held that a defendant's exclusion from a critical stage of his trial without waiver is structural error which does not require objection. *Bird* is clearly an on-point case in this matter. While the district court did explain to McClure that he had a right to be present at his own trial, after McClure decided to forgo that right, the district court failed to obtain from McClure an on-the-record personal waiver by McClure acknowledging that he voluntarily, intelligently and knowingly

waives that right. At a minimum, the district court had a duty to instruct McClure prior to McClure's absenting himself from the trial, that the jury would be instructed that it could not use McClure's absence against him. Nor did the district court advise McClure that he would be afforded the opportunity to return if he so chose. All of this advise and more was necessary for McClure to exercise a knowing, voluntary, and intelligent waiver.

Trial– Return of Verdict

McClure has a right to be present at all critical stages of his proceedings, especially the return of verdict. That particular phase is of such importance, the Montana Legislature has seen fit to create a specific statute regarding it. Mrs. Whipple specifically brought this to the attention of the court prior to the return of the verdict. As indicated above, Mont. Code Ann. § 46-16-123(2)(a) provides, in part, "[i]n all felony cases, the defendant shall appear in person when the verdict is returned or the sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the court finds that it is in the interest of justice that the verdict be returned...."

In this case, the district court did not exercise the requisite due diligence prior to finding the interests of justice would be served with the verdict being returned without McClure present. Here, the district court merely inquired of

McClure's attorney who had not even spoken to McClure about his desire to attend the return of the verdict. Rather, the district court merely relied on the speculation of Mr. Hud who had not even spoken to McClure. (Trial Tr., pg. 457).

While the district court established a lengthy record of why it was in the interests of justice to proceed in McClure's absence, it did not take the necessary first step of doing the due diligence of trying to procure McClure's presence or, at least, ascertaining if he was interested in being present. Such a failure violated McClure's right to be present during the return of verdict, or at least his right to waive the right to be present.

Conclusion

Because the district court failed to obtain an on-the-record, knowing, voluntary, and intelligent waiver of McClure's waiver of his right to be present at trial, the district court committed structural error which tainted the entire proceedings. That the district court did not conduct its due diligence regarding McClure's presence for the return of the verdict, compounds the error. At this point, absent a knowing, voluntary, and intelligent waiver, McClure could not know for certain what he was waiving.

Therefore, McClure respectfully requests that this Court reverse his conviction and remand his case back to the district court for a new trial.

II. THE DISTRICT COURT DENIED McCLURE THE RIGHT TO SELF-REPRESENTATION IN HIS THIRD TRIAL.

A criminal defendant has a long established constitutional right under both the United States and Montana Constitution to represent himself in a criminal proceeding.

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation", who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Faretta v. California, 422 U.S. 806, 820, 95 S. Ct. 2525, 45 L. Ed. 562 (1975).

Nor, can a court foist upon a criminal defendant unwanted counsel simply because the defendant appears untrained or even foolish.

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. *To force a lawyer on a defendant can only lead him to believe that the law contrives against him.* Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The

> defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (emphasis added) (quoting *Illinois v. Allen*, 397 U.S. 337, 350-35, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (Brennan, J., concurring).

This is not to say that the right to self-representation is unlimited. "[W]hen an accused chooses to forego the benefits of assistance of counsel and proceed on his own behalf, he is not entitled to have the rules of procedures and law...applied less strictly against him. Moreover, the right to self-representation does not vest in a pro se defendant a license to abuse the dignity of the courtroom or allow him not to comply with relevant rules of procedural and substantive law." *State v. Colt*, 255 Mont. 399, 407-408, 843 P.2d 747 (1992).

In *Colt*, the district court allowed Colt to proceed *pro se*, but appointed standby counsel. During the trial, Colt's behavior violated various rules of evidence and court rules. "After Cole had been admonished by the District Court on at least four occasions, and other instances of abuse had passed with no admonishment, that standby counsel was required to finish the cross examination of one witness and control the direct, cross, and redirect examination of the State's final witness." *Id.* at 408, 843 P.2d at 752-753. At the conclusion of the State's

case, the Court recessed for the day. The following morning, Cold was allowed to continue his self-representation and did so without further abuses. *Id.*

On appeal, Colt – who was by then represented by appellate counsel – appealed the district court's appointment of standby counsel. In Colt's case, this Court found no error by the district court. "Where substantial credible evidence exists to support the District Court's decision requiring standby counsel to assist in the defense where a pro se defendant fails, or is unable, to adhere to proper courtroom procedure and protocol, it will not be disturbed on appeal." *Id.* 409, 843 P.2d at 753.

McClure's case is remarkably distinguishable from the facts in *Colt*. First, there is no evidence that the district court even attempted to obtain assurances from McClure prior to the commencement of the final trial that McClure could abide by the rules set by the Court. The second trial, in which the district court had allowed McClure to proceed *pro se*, only presented one occasion in which McClure did not follow the rules. That case resulted in a mistrial. The third trial occurred on September 30, 2009, some time after the mistrial. When it came time for the third trial, the district court never even provided McClure the opportunity to proceed *pro se*, or attempt to obtain assurances from McClure that he would abide by the rules if allowed to proceed *pro se*. Rather, the district simply

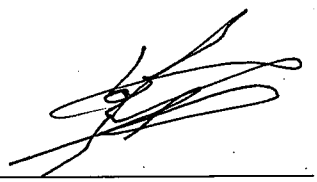
concluded that McClure's past behavior was sufficient grounds to violate McClure's right to represent himself.

In *Colt*, the defendant was provided an opportunity to continue his *pro se* representation after his behavior resulted in the takeover of standby counsel. Notably, Colt was able to resume *pro se* representation without further error. The same consideration was not afforded to McClure. Rather, the district court simply concluded that his past behavior violated his right to represent himself without any further inquiry about McClure's ability to follow the rules of the court. Such a situation is simply inconsistent with McClure's right to *pro se* representation. The district court should have provided McClure with the opportunity to continue *pro se* representation at the third trial provided that McClure agreed to follow all of the court's orders.

CONCLUSION

For the reasons set forth above, McClure respectfully requests this Court revers McClure's conviction and remand his case back to the district court.

Respectfully submitted this 15th day of April, 2010.



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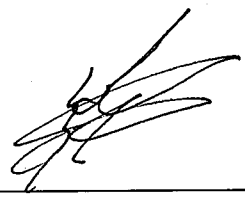
CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Time New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my WordPerfect X3 software.

Dated this 15th day of April, 2010.



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CERTIFICATE OF SERVICE

I, Colin M. Stephens, do hereby certify that I delivered a true and correct copy of the foregoing Appellant's Opening Brief to the following, via the means indicated:

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